

United States v. Aguilar, 07-10346

SEP 09 2008

Hug, Circuit Judge:

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

I respectfully dissent.

I agree with the majority on all aspects except for those reasons set forth in section 5. The majority mentions an agreement of the parties that the convictions would not be presented to the jury. That agreement was in the prior trial that was dismissed as a mistrial. In that trial, the parties had discussed the possible admission of the convictions for the impeachment of Aguilar's testimony under Fed. R. Evid. 609. The parties agreed to a court ruling that the convictions would not be admitted unless Aguilar testified.

In this case, the convictions were not admitted for impeachment under Rule 609, but for their relevance under Fed. R. Evid. 404 to show that Aguilar was the alien who had been deported. When his attorney attacked the accuracy and validity of the INS files and records, the court, after several warnings that this continued attack could open the door to admission of the convictions for this purpose, did admit the convictions. Nothing in the record of this case shows the parties had entered a general agreement not to present the convictions to the jury, nor was such an argument made in the appellant's opening brief.

The majority incorrectly concludes that the probative value of the conviction record documents was minimal. The conviction records "linked, by alias and

fingerprint identification, the convictions to specific INS files and deportation orders therein.” *See infra* Section 5. The conviction records contained Aguilar’s fingerprints and other identifying characteristics, as did the deportation orders. With these characteristics, the conviction records were important to establish that Aguilar was the person deported. The value of this connection was central to establishing Aguilar as the person deported. Therefore, the probative value of these records was very substantial.

Additionally, the majority incorrectly concludes the district court abused its discretion in admitting the prior convictions because Aguilar did not sufficiently open the door to allow the prior convictions. The government proffered the prior convictions to rebut Aguilar’s contention that he was not the person deported in the deportation orders. The majority minimizes Aguilar’s contention of mistaken identity as a “proffered theory” of his case. However, this characterization misstates the actual nature of Aguilar’s argument. Aguilar claimed that he was neither the person deported nor the person in the deportation documents as a matter of fact, not theory.

The majority relies upon *United States v. Sine*, 493 F.3d 1021, 1037-38 (9th Cir. 2007). As opposed to the situation in *Sine* where the defendant only made “passing reference” to an argument that the government claimed opened the door

to questioning about otherwise inadmissible evidence, *id.* at 1037, Aguilar repeatedly referred to the alleged mistaken identity in the deportation orders. Aguilar did more than “proffer a theory” of his case; his identity in the deportation records was central to his defense. He continually attacked the validity of the records, contending that he was not the person in the deportation orders. This continual attack on the validity of the deportation records and Aguilar’s identity as the person deported, after warnings by the court, led to the judge’s order that Aguilar had opened the door to admission of the conviction records. Thus, the district court properly admitted the conviction records to rebut his arguments.